(25)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 535

PARAGON LAND CORP.,

Petitioner,

v.

JOSEPH P. DAY and BRADLEY DELEHANTY,
Trustees, etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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Petition.

Petitioner, Paragon Land Corp., prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York dated the 25th day of June, 1942, making the order and judgment of the Court of Appeals of the State of New York, the order and judgment of the said Supreme Court.

Opinion Below.

The Court of Appeals affirmed the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, in so far as this petitioner is concerned, in an opinion reported in 288 N. Y. 270. The said Appellate Division and the lower Court rendered no opinions.

Statutes Involved.

The statutory jurisdiction of the Supreme Court of the State of New York as provided for in Chapter 745 of the Laws of New York for year 1933 (commonly known as the Schackno Act) and Chapter 19 of the Laws of New York for year 1935 (commonly known as the Mortgage Commission Act) are referred to in the petition. The pertinent sections of the said Statutes are as follows:

Section 8 of Chapter 745 of the Laws of 1933 provides:

> "JURISDICTION OF SUPREME COURT. The supreme court of the county in which any such guaranty corporation has its principal office is hereby vested with jurisdiction and authority to determine the fairness of any plan or agreement which may be promulgated hereunder with respect to any mortgage investments sold or guaranteed by such guaranty corporation and to approve, modify or disapprove the same. Such court shall make an order approving, modifying or disapproving such plan or agreement. In the event that the court shall have approved or modified such plan or agreement; and if at the time of the entry of such order the court shall have been satisfied that sixty-six and two-thirds percentum of the holders in principal amount of such mortgage investment or their duly authorized agent have approved such plan or

agreement, such order shall recite such fact, and shall thereupon be binding upon all the holders of such mortgage investments and the guaranty corporation which shall have sold or guaranteed them and all of the parties interested therein. If at the time of making such order such percentage of the holders of such mortgage investment shall not have approved the same, such order shall provide that upon satisfactory proof of the fact that sixty-six and two-thirds percentum of the holders in principal amount of such mortgage investments shall have approved the same, a further order may be entered ex parte approving such plan or agreement, which further order shall be binding upon all the holders of such mortgage investments and upon the guaranty corporation which shall have sold or guaranteed the same and upon all other parties interested therein."

Article VII of Chapter 19 of the Laws of 1935 refers to the Jurisdiction of the Supreme Court. Section 11 of said Chapter as contained in said Article is as follows:

"THE COURT TO PASS UPON PROPOSAL OR PLAN. The supreme court for the county in which a guaranty corporation has or had its principal office is hereby vested with jurisdiction and authority to determine the fairness of any proposal or plan which may be promulgated hereunder with respect to any mortgage investment guaranteed by such guaranty corporation and to approve, modify or disapprove the same, provided, however, that where the underlying security or securities, property or properties affected by such proposal or plan is or are located within one county, then the supreme court held in such county shall have such jurisdiction. In considering such proposal, the court or a referee appointed by the court shall determine whether such proposal or plan is fair, reasonable and equitable to the holders of mortgage investments and

whether it meets their best interests. If a referee be appointed he shall report his determination for confirmation or modification upon such notice as the court shall direct. Nothing herein contained shall affect the jurisdiction of the supreme court held in any county with respect to any proceeding pending in such court at the time this act takes effect."

Section 13 of said Chapter 19 of the Laws of 1935 provides:

"APPOINTMENT OF COMMISSION AS TRUSTEE. In passing upon any proposal or plan or agreement proposed under this act or under chapter seven hundred forty-five of the laws of nineteen hundred thirty-three, the court may appoint the commission to act as trustee, substitute or successor trustee."

Section 17 of said Chapter 19 of the Laws of 1935 provides:

"GENERAL POWERS OF COURT. The court shall also have jurisdiction to make orders in respect of any and all matters as to which court action is hereby provided and to make orders upon the petition of the commission, or of any other interested party, to enforce any provision of this act."

Questions Presented.

I.

Was the said order made by the Special Term of the Supreme Court, affirmed by the Appellate Division, violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States, insofar as the petitioner was concerned?

II.

Did the agreement made by the trustees, appointed by the Supreme Court of New York in reorganization proceedings pursuant to Chapter 745 of the Laws of 1933 (commonly known as the Schackno Act) and Chapter 19 of the Laws of 1935 (commonly known as the Mortgage Commission Act), for the sale of land to the petitioner which land the trustees did not own but was owned by the County of Nassau, and which agreement was approved by a Justice of the said Supreme Court, constitute a judicial sale?

III.

A controversy having arisen between the trustees and the petitioner with respect to said agreement, did a Justice of the Supreme Court of the State of New York presiding at Special Term of said Court have jurisdiction to summarily make an order directing the petitioner to complete its purchase in disregard of the timely objection of the petitioner that it was being deprived of its property rights without due process of law in violation of the Constitution of the United States?

Jurisdiction.

In the remittitur of the Court of Appeals appears the following:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellants argued that the orders made by the Special Term of the Supreme Court, affirmed by the Appellate Division, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that said order of the Special

Term of the Supreme Court, affirmed by the Appellate Division, are not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States, insofar as Paragon Land Corporation was concerned."

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C., Section 344(b)]. The time for the petitioner herein to apply for this writ was extended by the orders of Associate Justice Stanley Reed, dated September 23rd, 1942 and October 21st, 1942, to and including November 24th, 1942.

Statement.

The facts material to this application are as follows:

In 1936, the respondents together with Frederick R. Crane, now deceased, were appointed trustees, by a final order made by a Justice of the Supreme Court of the State of New York, of a consolidated certificated bond and mortgage covering certain real property in Nassau County, State of New York, in reorganization proceedings instituted by the Mortgage Commission of the State of New York pursuant to Chapter 745 of the New York State Laws for the year 1933 and Chapter 19 of the New York State Laws for the year 1935. The trustees duly qualified, filed a declaration of trust substantially in the form required by the order appointing them, and the aforesaid bonds and mortgages, as consolidated, were thereupon assigned to the trustees. Thereafter, the trustees foreclosed the bond and mortgage, consolidated as aforesaid, and became the owners of the mortgaged premises in 1938 (R. 9-10).

Prior to the appointment of the said trustees, the County of Nassau, State of New York, had sold the twelve tax parcels of real property (consisting of the trust property)

for non-payment of taxes and on said tax sales the said County of Nassau purchased eleven of the said twelve parcels and on the 14th day of October, 1939, became the owner thereof (R. 10-11).

Negotiations were thereafter entered into between representatives of the trustees, the Paragon Land Corp. and representatives of the County of Nassau, as a result of which a stipulation was signed by the attorneys for the trustees and ~~and~~ the attorney for the County of Nassau, subject to the approval of the Board of Supervisors of Nassau County and the Supreme Court, for the sale of certain property by the County of Nassau to the trustees, which said stipulation was annexed to and made part of a written agreement entered into between the trustees, as sellers, and the Paragon Land Corp., as purchaser, for the sale of said real property mentioned and described in said agreement for the sum of Three hundred thousand ($300,000) Dollars. *In the agreement and stipulation, time was made of essence* (R. 67, Vol. I).

At the time the agreement and stipulation were made, the trustees had no title to the property, which formerly formed the trust estate as the tax liens upon it had been sold and title to the property was acquired by the County of Nassau as hereinbefore stated.

The stipulation and agreement were approved by the Court by an order which terminated the proceeding commenced by the trustees on March 20, 1939 for instructions (R. 96-99, Vol. I).

The agreement provided that title was to close on April 15th, 1940 (R. 40, 63, Vol. I) on which date the trustees were not the owners of the said property which was the subject matter of the agreement and in addition the Board of Supervisors of Nassau County had not ratified and approved the said stipulation providing for the conveyance of the premises on the payment of the consideration therein provided for. The trustees were therefore not in a posi-

tion to give title and the closing was adjourned to April 22, 1940, title to close as of April 15th (R. 25, Vol. I).

On April 22nd, 1940, the trustees were again unable to give title, as the Board of Supervisors of Nassau County had not ratified and approved the said stipulation, and on that day the Paragon Land Corp. tendered the sum of $75,000.00 in certified checks, pursuant to the agreement (R. 103-104, Vol. I).

The trustees claimed that the tender was incomplete and that the closing was adjourned and that thereafter on May 6th, 1940, the Paragon Land Corp. refused to take title pursuant to a notice served (R. 28, Vol. I).

The Paragon Land Corp. claimed that since time was of the essence in its agreement with the trustees, and since at the time set for the closing it had tendered all the money required to be paid, that it was therefore relieved from further performance (R. 104-105, Vol. I).

A controversy arose between the trustees and the Paragon Land Corp. with respect to said agreement and the respondents submitted affidavits to a Justice of the Supreme Court of the State of New York upon which said Justice made an order to show cause directed not only to the petitioner, Paragon Land Corp., but also to Morris Walzer, Louis Weinstock and Harold J. Weinstock, who had made no agreement whatsoever with the trustees, requiring them to show cause at a Special Term of the said Supreme Court, why an order should not be made requiring Paragon Land Corp. to carry out and perform the contract, a copy of which was annexed to the said affidavits, and to complete the purchase thereunder, and why it should not be decreed that Paragon Land Corp. was organized solely for the purpose of acting as a mere agency or instrumentality of Morris Walzer, Louis Weinstock and Harold J. Weinstock, or either of them that the corporate identity of Paragon Land Corp. be disregarded in order to prevent loss to the certificate holders mentioned in the annexed affidavits and so that the rights and interests of such certifi-

cate holders may be protected and in the interests of justice, and why it should not be decreed that Morris Walzer, Louis Weinstock and Harold J. Weinstock, or either of them that the corporate identity of Paragon Land Corp. be disregarded in order to prevent loss to the certificate holders mentioned in the annexed affidavits and so that the rights and interests of such certificate holders may be protected and in the interests of justice, and why it should not be decreed that Morris Walzer, Louis Weinstock and Harold J. Weinstock, or any of them, are the real parties in making the aforesaid purchase, that they, and each of them, be required to furnish the consideration necessary to consummate the aforesaid contract (R. 7-68).

The petitioner herein, Paragon Land Corp., and the said Morris Walzer, Louis Weinstock and Harold J. Weinstock, filed a petition with the Appellate Division of the Supreme Court of the State of New York, Second Department, wherein they sought a prohibition order against the said Justice of the Supreme Court of the State of New York with respect to said order to show cause on the ground that there was no jurisdiction to make the same or to hear the subject matter thereof, which motion was denied by the said Appellate Division in the exercise of discretion (R. 71-72).

When the motion brought on by said order to show cause appeared for argument before another Justice of the Supreme Court, the petitioner herein, Paragon Land Corp., and the other persons mentioned in said order to show cause, Morris Walzer, Louis Weinstock and Harold J. Weinstock, appeared specially and objected to the jurisdiction of the Court and submitted affidavits wherein they claimed that the due process clauses of the Constitutions of the State of New York and United States were being violated (R. 101-116).

The said Justice of the Supreme Court made an order granting in all respects the motion made as aforesaid and

which said order contained the following provisions (R. 4-6):

> "Ordered, that Paragon Land Corp. be and it hereby is directed to carry out and perform, as of May 6, 1940, the contract, a copy of which is annexed to the papers upon which said order to show cause was made, and which contract bears date March 18, 1940, and is made by Joseph P. Day, Frederick R. Crane and Bradley Delehanty, as Trustees for Certificate Holders of Series or Guarantee No. 171038 of the Bond and Mortgage Guarantee Company, under a Declaration of Trust dated the 1st day of June, 1936, as sellers, and Paragon Land Corp. as purchaser; and it is further
>
> Ordered, that Paragon Land Corp. was organized solely for the purpose of acting as an agency or instrumentality of Morris Walzer, Louis Weinstock and Harold J. Weinstock as a syndicate of purchasers and the real parties making the purchase through said contract of March 18, 1940, and who represented to the Court that they were acting through such corporation as a responsible and financially able purchaser; and it is further
>
> Ordered, that said Morris Walzer, Louis Weinstock and Harold J. Weinstock, and each of them, be and each of them hereby is directed to furnish the funds and consideration necessary to consummate the aforesaid contract".

The petitioner herein, Paragon Land Corp., and the said Morris Walzer, Louis Weinstock and Harold J. Weinstock, appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department, from the aforesaid order and the said Court on June 9th, 1941, unanimously affirmed the said order without opinion (R. 136-138).

The Court of Appeals of the State of New York granted permission to the petitioner herein, Paragon Land Corp.,

and the said Morris Walzer, Louis Weinstock and Harold J. Weinstock, to appeal from the said order of the said Appellate Division, and the said Court of Appeals on the 5th day of June, 1942, made its remittitur wherein it is recited that the said Court of Appeals did order and adjudge that the order be affirmed in so far as it granted the application to compel the corporate appellant to complete its purchase; and that the order was reversed in so far as relief is granted against the individual defendants; that a question under the Constitution of the United States was presented and necessarily passed upon; the appellants argued that the order made by the Special Term of the Supreme Court, affirmed by the Appellate Division, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States; the Court of Appeals held that said order of the Special Term of the Supreme Court, affirmed by the Appellate Division, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States, in so far as Paragon Land Corporation was concerned (R. 1, 11-13, Vol. III).

This writ is sought only by the petitioner as against whom the Court of Appeals affirmed said order of the Appellate Division of the Supreme Court.

Specification of Errors to be Urged.

The Court of Appeals erred

1. In holding that the Supreme Court had jurisdiction to grant a summary order directing the Paragon Land Corp. to complete its purchase, and that the Appellate Division did not err in affirming said order.

2. In holding that the Paragon Land Corp. in entering into an agreement with the trustees for the purchase of land which the trustees did not own, submitted itself, at

least to that extent, to the jurisdiction of the Court and became a party to the proceeding.

3. In holding that because the statutes (Laws of 1933, Ch. 745 as amended and Laws of 1935, Ch. 19) by necessary implication confers upon the Court at Special Term jurisdiction over sales made by trustees from inception to completion, that the voluntary entering into an agreement by Paragon Land Corp. with the trustees for the sale of land which they do not own but which is owned by the County of Nassau, State of New York, and which agreement provides that it is subject to the approval of the Court, constitutes a submission by the Paragon Land Corp. to the jurisdiction of the Court to give summary directions compelling it to complete its purchase.

4. In holding that the agreement between the trustees-respondents and the Paragon Land Corp. for the sale of land which said trustees did not own, approved by the Court constituted a judicial sale, and that although the trustees are not to be regarded in all respects as officers of the Court and that the trust property is not, in full sense, in the custody of the Court that none the less, the property is brought into the protective arm of the law and the trustees are subject to the directions of the Court and since the said statutes by necessary implication confers upon the Court at Special Term jurisdiction over the sales made by the trustees from inception to completion, and because Paragon Land Corp. voluntarily entered into such a sale, subject to the approval of the Court, that said Paragon Land Corp. has submitted itself to the jurisdiction of the Court to give summary directions compelling it to complete its purchase.

5. In not holding that the agreement for the sale of property by the trustees to the Paragon Land Corp. which they did not own, the said trustees not being officers of

the Court and the property not being subject to the jurisdiction of the Court, that the said agreement even though it was approved by the Court did not constitute a judicial sale.

6. In not holding that the denial to the petitioner of an opportunity to present evidence on a triable issue of fact involving property rights is a denial of due process of law as guaranteed by the constitution of the United States.

7. In affirming the order of the Appellate Division of the Supreme Court affirming the order of the lower Court.

Reasons for Granting the Writ.

While the brief hereto annexed presents in more amplified form, the reasons relied on by petitioner for the allowance of the writ, these reasons may be summarized as follows:

1. Special Term of the Supreme Court, State of New York, erred in holding that the agreement between the trustees and the petitioner for the sale of land which the trustees did not own and which was owned by the County of Nassau, State of New York, which agreement was approved by the Court, constituted a judicial sale and on a motion without the commencement of any action, and without any trial, and over the objections of the petitioner who appeared specially and objected to the jurisdiction of the person of the petitioner and the property involved, the said Supreme Court summarily directed the petitioner to complete its purchase. The Appellate Division of the Supreme Court affirmed said order and the Court of Appeals affirmed the order of the Appellate Division in so far as this petitioner was concerned. The petitioner has been deprived of its property rights without due process of law in violation

of the Fourteenth Amendment of the United States Constitution.

The determination of the Court of Appeals is in conflict with the decisions of this Court and the Court of Appeals must have disregarded the decisions of this Court in making its determination.

It is submitted that the issues involved present questions of vital public and national importance. The present conflict between the decisions of this Court and that of the Court of Appeals, we respectfully submit warrant an examination and review of the judgment of the Supreme Court of the State of New York dated June 25th, 1942, which makes the order and judgment of the Court of Appeals the order and judgment of the Supreme Court.

Dated, New York, November 19th, 1942.

SAMUEL OKIN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The only Court which rendered any opinion is the Court of Appeals which is reported in 288 N. Y. 270, and is found at pages 1-10, Vol. III, of the record.

Jurisdiction.

The jurisdiction is developed at page 5 of the petition.

Statement of the Case, Questions Presented, Statutes Involved, Etc.

The statement of the case, the questions presented, and specifications of errors to be urged have been set forth in the petition.

ARGUMENT.

1 (a) There Being No Judicial Sale Involved, the Summary Proceedings in the New York State Courts Without Any Statutory Authority Therefor, and the Denial to the Petitioner of a Hearing, Argument and Opportunity to Present Evidence on a Triable Issue of Fact Involving Property Rights, Constituted a Deprivation by the Petitioner of Its Property Without Due Process of Law in Violation of the Fourteenth Amendment of the Constitution of the United States.

We contend that the Courts below have given such a construction to the Constitution of the United States, as applied to the facts in this case, as to deprive the petitioner of its property without due process of law.

The constitutional question was properly raised in all the Courts, and the Court of Appeals says in its remittitur:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellants argued that the orders made by the Special Term of the Supreme Court, affirmed by the Appellate Division, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that said order of the Special Term of the Supreme Court, affirmed by the Appellate Division, are not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States, insofar as Paragon Land Corporation was concerned."

The order to show cause dated the 23rd day of May, 1940, signed by a Justice of the Supreme Court (R. 7-8, Vol. I), and the so-called proceedings thereafter wherein the petitioner appeared specially and objected to the jurisdiction of the Court over the petitioner and property involved, which resulted in the order dated August 6th, 1940 (R. 4-6, Vol. I), necessarily did violence to the petitioner's constitutional rights, and was without statutory authority or precedent.

The agreement between the trustees as sellers and the petitioner as purchaser of certain land owned by the County of Nassau, State of New York, which had formerly been owned by the said trustees, did not constitute a judicial sale under the decisions of this Court later referred to. A dispute having arisen with respect to the said contract, any alleged claim by any of the parties thereto with respect to said contract, could only be enforced in the usual form of action wherein judgment can only be rendered after a hearing, argument and the examination of witnesses. There is no authority for the enforcement of the alleged claims of any party to the contract summarily as was done in this case.

The denial of an opportunity to a litigant to present evidence and be heard on a triable issue of fact involving property rights is a denial of due process of law as guaranteed by the Constitution of the United States. This Court so held in the cases of *Ochoa* v. *Hernandez*, 230 U. S. 130; *Saunders* v. *Shaw*, 244 U. S. 317; *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U. S. 278.

In the recent case of *Morgan* v. *United States*, 298 U. S. 468, this Court said at page 480:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceeding in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Again in the case of *Shields* v. *Utah, Idaho R. Co.*, 305 U. S. 177, this Court said at page 182:

> "The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."

In re *National Labor Board*, 304 U. S. 486, 58 S. Ct. 1001, 1005, 82 L. Ed. 1482, this Court said:

"Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith."

In *New York Life Insurance Co.* v. *Guttag Corp.*, 265 N. Y. 392, the New York Court of Appeals reiterated the well established principle of law that substantial questions of fact should not be decided on affidavits because that does not constitute due process of law.

In the case at bar, there was a very serious dispute between the parties and under no circumstances should the issues have been decided on affidavits even if it were assumed that the Court had jurisdiction which petitioner contends, however, it did not have.

The petitioner has been deprived of its property without due process of law in violation of the Constitution of the United States.

1 (b) The Real Property Which Was the Subject Matter of the Said Contract of Sale Was Owned by the County of Nassau and Was Not in the Possession or Under the Control of the Court. The Agreement and the Stipulation, If They Have Any Legal Significance, Constituted a Private Sale, If Any, and Not a Judicial Sale.

The Court of Appeals erred in holding that the agreement by the trustees to sell to the petitioner land which they did not own but which was owned by the County of Nassau, constituted a judicial sale.

In its opinion the Court of Appeals said:

"The trustees were appointed by the court pursuant to statute. The appellants were not originally parties to the proceedings brought pursuant to the statute for the formulation and approval of the plan and for the appointment of the trustees. In the statutory proceeding the court at Special Term has no jurisdiction over the subject matter of any application for relief which the statute does not expressly or impliedly authorize the court to grant, nor does the court have jurisdiction of the person of any corporation or individual who is not a party to the proceeding. Under the provisions of the statute and the plan formulated and approved pursuant to those provisions, the trustees appointed by the court were empowered to sell the trust property only with the approval of the court. Paragon Land Corp. agreed to purchase the property subject to the approval of the court. By entering into that agreement Paragon Land Corp. submitted itself, at least to that extent, to the jurisdiction of the court and became a party to the proceeding.

There can be no doubt that the purchaser upon a judicial sale made under the direction of the court and subject to the approval of the court, becomes subject to the jurisdiction of the court to compel the purchaser to complete the contract of purchase. (*Brasher* v. *Cortland,* 2 Johns. Ch. 505, Kent, Ch.; *Matter of Dennison,* 114 N. Y. 621.) It may be that the trustees in this case are not to be regarded in all respects as officers of the court and that the trust property is not, in full sense, in the custody of the court. The property, none the less 'is brought into the protective arm of the law' and the trustees are 'subject to directions of the court.' Under these circumstances the court should draw no fine distinctions. The statute by necessary

implication confers upon the Court at Special Term jurisdiction over sales made by the trustees from inception to completion, and Paragon Land Corp., having voluntarily entered into such a sale, subject to the approval of the court, has submitted itself to the jurisdiction of the court to give summary directions compelling it to complete its purchase. We find support for this conclusion in analogy between the trustees and receivers in bankruptcy. (See *Mason* v. *Wolkovitch*, 150 Fed. Rep. 699; *Matter of Atlas Cabinet Works, Inc.*, 8 Fed. Supp. 609; *Matter of Dallet Bros., Inc.*, 8 Fed. Supp. 610.)"

The foregoing is contrary to the decisions of this Court. In the case of *Williamson* v. *Berry* (1850), 49 U. S. 495, when called upon to construe a trustee's deed which had been approved by the Court, this court said at page 547:

> "It was also argued, that the sale to De Grasse was a judicial sale. Unless a legal term of definite and unmistakable certainty in all the past application of it shall be made to comprehend a transaction which it has never included before, the sale by Clarke to DeGrasse was not a judicial sale. By judicial sale is meant one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.
>
> The sale by Clarke to DeGrasse was an attempt by both of them to evade the order of the Chancellor, that every sale, etc., made by Clarke, shall be approved by one of the masters of this Court, and that a certificate of such approval be endorsed upon every deed or mortgage that may be made in the premises. And in no event could a sale by Clarke, in conformity with the order, have been a judicial sale, but simply a sale by a private individual authorized to make it under acts passed for his relief, and assented to by the Chancel-

lor, for the purpose of ultimately substantiating and verifying by a court of record the transfer of the property. It was a sale made without process, not by an officer in any sense of the word, but by a private person to a private person, after negotiation between them, and done by one of them, who had only in a particular way the assent of the Chancellor to sell."

In *Commonwealth Co.* v. *Bradford*, 297 U. S. 613 at page 619, this Court said:

"Property in its (the trustee's) possession is not *in custodia legis* as in case of receivers. *Hinckley* v. *Art Students' League*, 37 F. (2d) 225, 226; *Appeal of Hall*, 112 Pa. 42, 54; 3 Atl. 783; *Strouse* v. *Lawrence*, 160 Pa. 421, 425; 28 Atl. 930; *Goodwin* v. *Colwell*, 213 Pa. 614, 616; 63 Atl. 363; *Nevitt* v. *Woodburn*, 190 Ill. 283, 289; 60 N. E. 500."

The Court of Appeals must have disregarded the aforesaid decisions of this Court in the determination against the petitioner.

Although the trustees under their deed of trust cannot sell real property without first obtaining the consent of the Court nevertheless any order approving such sale is nothing more than judicial consent and can not form the basis of any contention that there was a judicial sale.

In *Kenaday* v. *Edwards*, 134 U. S. 117, at page 125, this Court said:

"That he had the right to surrender his trust, and that it was competent for a court of equity to appoint another person to take the title to the trust property, cannot, in our opinion, be successfully questioned. But the order appointing a new trustee expressly declared that he should at all times be subject to the control and order of the court touching the trust.

> His subsequent sale, therefore, of the property was subject to confirmation or rejection by the court. He could not pass the title without its consent."

In *Christie* v. *Gage*, 71 N. Y. 189, at page 194, the Court said:

> "There is no ground for the contention that the conveyance, having been made by the church in pursuance of the order of the court, obtained on its application, made the transaction a judicial sale, and, therefore, not within the statute. The church, as a religious corporation, organized under the act of 1813, had only a limited capacity to convey. It could convey only under the sanction of the court, and the order obtained in this case was simply the authority for completing its voluntary undertaking to sell the lands in question."

The petitioner contends that there is no analogy between a sale by a trustee or receiver in bankruptcy, as referred to in the opinion of the Court of Appeals, and the agreement of sale by the trustees herein.

A trustee or receiver in bankruptcy is an officer of the Court appointing him, the property sold in bankruptcy is in the possession and custody of the Court and such a sale is a judicial sale.

The trustees herein were appointed pursuant to statutes (Schackno and Mortgage Commission Acts, supra) and are therefore statutory trustees and not officers of the Court.

They had no title to the property which is the subject matter of the stipulation and agreement, because it is undisputed that the County of Nassau owned the same and still owns the same. Even if they had title, the same would be immaterial because even then, the mere approval by the Court would not constitute a judicial sale.

The res was not in the possession of the Court and the Court had and has no control over the same. The Court had and has no jurisdiction to make any order directing the disposition of real property owned by the County of Nassau.

As a matter of fact under the agreement and stipulation the County of Nassau was under no obligation to the trustees unless the Board of Supervisors of Nassau County ratified and approved the stipulation and even then the stipulation had no effect unless the purchaser would take title.

Under the stipulation the purchaser got nothing unless the trustees got title, and if the trustees did not get title, all the purchaser could demand under the agreement was the return of its money and title company charges.

A purchaser at a judicial sale has the right to apply to the Court for relief or to direct the Court's representative to make conveyance under the judicial sale. Can any one possibly contend that if the Paragon Land Corp. at any time had applied to the Court and asked for title, assuming that the County of Nassau was unwilling to convey to the trustees, that the Court would have had the power to direct the trustees and the County of Nassau to convey title to the Paragon Land Corp., even assuming that we were to consider the trustees as officers of the Court.

Judicial sales have been construed as made by the Court. Can any one possibly say that in this case the Court was buying the real property from the County of Nassau in order to sell it to the petitioner? That is what the stipulation and agreement provided for.

It is apparent in the said agreement that the Court was not selling any property through any ministerial officer pursuant to any judgment or order of the Court.

The order appointing the statutory trustees, respondents herein, and approving the plan of rehabilitation of the

mortgage investment, terminated the special proceeding and there is no proceeding pending.

Matter of Lawyers Mortgage Company, 284 N. Y. 325.

The agreement of the trustees to sell lands to the petitioner which they did not own and which agreement was approved by an order of the Court did not constitute a judicial sale and the Court of Appeals erred in so holding.

CONCLUSION.

It is respectfully submitted that this petition should be granted.

SAMUEL OKIN,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 535

PARAGON LAND CORP.,

Petitioner,

v.

JOSEPH P. DAY and BRADLEY DELEHANTY,
Trustees, etc.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

TABLE OF CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1942

No. 535

PARAGON LAND CORP.,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

(*References to the record appear in parentheses, giving the volume number in Roman numerals and page and folio numbers in Arabics.*)

Revised Statement

The manner in which petitioner incorporates in the statement that it had made a tender of performance and the repeated assertion that the reorganization trustees were attempting to sell property which they did not own (both questions of fact determined against petitioner by the State Courts), and the omission of vital facts, require presentation of a revised statement.

About 1931, Lannin Realty Company owned some 825 acres of land at East Meadow, Nassau County, N. Y., which it mortgaged for $600,000 to Title Guarantee and Trust Company and which thereupon sold participating interests in the mortgage to investors, such interests being represented by what were known as guaranteed mortgage certificates. Payment of principal and interest was guaranteed by Bond and Mortgage Guarantee Company under guarantee No. 171,038 (I, p. 9).

The Bond and Mortgage Guarantee Company, together with other mortgage guarantee companies, suffered by reason of the collapse of the real estate and mortgage market, and was taken over by the Superintendent of Insurance of the State of New York on August 2, 1933, for rehabilitation and later for liquidation, pursuant to the Insurance Law of the State of New York (I, p. 84).

The Legislature of the State of New York enacted what was called the Schackno Act (chap. 745, Laws of 1933), under which the Superintendent of Insurance was empowered to reorganize the guaranteed mortgage issues of such companies and the rights of the investors in mortgage certificates (Sec. 6 of Act). That law was sustained as constitutional (*Matter of People* (*Title & Mtge. Guar. Co.*), 264 N. Y. 69).

Under that law, the Superintendent instituted many reorganization proceedings in the Supreme Court of the State of New York, which court was given jurisdiction for that purpose under the so-called Schackno Act.

The customary procedure was for the court to appoint a trustee of the mortgage issue to take the same over from the Superintendent and then to make arrangements with the owner of the mortgaged property for modification of the mortgage, such as extending maturity, modifying the terms of the mortgage and similar matters all looking to the ultimate payment of the mortgage and

distribution of the moneys to the certificate holders. Where that could not be accomplished, the trustee was authorized to foreclose the mortgage, acquire title to the property and then endeavor to sell it so that the sale proceeds could be distributed to the certificate holders.

Later, the Legislature enacted the Mortgage Commission Act (chap. 19, Laws of 1935) which recited that the Superintendent of Insurance was not adequately equipped to handle the situation, and created the Mortgage Commission with a more adequate staff of help. The Supreme Court of the State of New York was again vested with jurisdiction of reorganization proceedings and such proceedings could thereafter be taken under either, or both, of such Acts (Sec. 4, subd. 15, Mtge. Com. Act). That law was also sustained as constitutional (*Matter of Mortgage Comm. (1175 Evergreen Ave.)*, 270 N. Y. 436, 1 N. E. 2d 838).

The Mortgage Commission thereupon promulgated a plan for the reorganization of the mortgage issue No. 171,038. The State Supreme Court approved the plan by order dated May 26, 1936 (I, p. 80).

By the order the court provided that having assumed jurisdiction of the reorganization proceeding, it would retain jurisdiction until the complete liquidation of the trust estate and the termination of the trust (I, p. 91).

The order appointed the respondents, Joseph P. Day and Bradley Delehanty trustees (together with Frederick R. Crane who has since died), and directed them to execute a Declaration of Trust in the usual form used in such proceedings.

It is not claimed that the order in this proceeding departed in any manner from the usual order in such reorganization proceedings.

The Declaration of Trust defined the trust estate as the certificated mortgage and any real property acquired

through foreclosure of the mortgage and provided that the trustees had no authority to sell the property constituting the trust estate without the permission of the court by order obtained in the reorganization proceeding after ten days' notice to the certificate holders (I, p. 78, f. 233).

It is not necessary to further detail the procedure in New York State mortgage reorganization proceedings, as this Court is quite familiar with it (*Marine Harbor Properties* v. *Manufacturers Trust Co.*, U. S. , decided November 9, 1942).

The trustees subsequently foreclosed the mortgage, acquired title to the mortgaged premises and then made efforts to sell the property. Various offers were received. The trustees thereupon applied to the court in the reorganization proceeding, upon notice to the certificate holders, for advice and direction as to such offers (I, p. 96, ff. 288, *et seq.*) During the pendency of that proceeding one Abraham Levingson, "attorney representing syndicate of purchasers," submitted an offer "on behalf of a syndicate represented by me," to purchase the property for $300,000 (I, p. 12, f. 35), of which $90,000 was to be paid in cash and the balance by purchase money mortgage.

Representations were made at a hearing in open court, that this syndicate had the facilities for developing the property and were financially able men (I, p. 95, f. 285).

The court thereupon decided that such offer was best for the certificate holders, in preference to one of the other offers (I, p. 12, f. 36), and directed the trustees to enter into a contract for the approval of the court.

Paragon Land Corp. was thereupon announced as the purchaser to be named in the contract, but the down payment had been made by the individual check of one of the syndicate (f. 35).

The contract, which was then prepared and signed, expressly provided that it was to be subject to the approval

of the court as required by the Declaration of Trust under which the trustees were acting (I, p. 40, f. 119).

The contract was approved by the court (I, p. 98) but the syndicate subsequently lacked part of the required cash (I, p. 25, f. 75) and Paragon Land Corp. failed to complete the contract (I, p. 28).

It then developed that Paragon Land Corp. was merely a "paper corporation," and that the incorporators were a stenographer in the office of Levingson and a stenographer and employee in the office of Morris Walzer, one of the syndicate members (I, p. 29, f. 85).

The trustees then presented the situation to the court by formal affidavits, in the reorganization proceeding (I, pp. 8, *et seq.*), and obtained an order from the Court directing Paragon Land Corp. to show cause why it should not be required to carry out and perform the contract and why it should not be decreed that the corporation was organized solely for the purpose of acting as the agency and instrumentality of the syndicate members Morris Walzer, Louis Weinstock and Harold J. Weinstock, why the corporate entity should not be disregarded so that the rights of the certificate holders would be protected, and why the syndicate members should not be required to furnish the funds for the completion of the purchase (I, p. 7).

The syndicate then sought to prevent a hearing by applying for a writ of prohibition against the court. That was denied (III, p. 5, f. 14). They then came into court and by formal application sought to have the aforesaid order to show cause vacated on the ground that the Justice had no power to sign the order. That was denied and, upon appeal, the ruling was unanimously affirmed (III, p. 5).

Eventually, the court made an order on August 6, 1940 (I, p. 4), directing the Paragon Land Corp. to complete the purchase and decreeing that the Paragon Land Corp.

was organized solely as the agency of the syndicate, that the syndicate members were the real parties in interest "who represented to the Court that they were acting through the corporation as a responsible and financially able purchaser," and directed the syndicate members to furnish the funds for the consummation of the purchase.

On appeal by the corporation and the syndicate members, the order was unanimously affirmed by the Appellate Division of the New York Supreme Court (I, p. 136).

The Court of Appeals of the State of New York allowed an appeal to that Court (I, p. 134).

The Court of Appeals affirmed the lower courts in so far as the Paragon Land Corp. was directed to complete the purchase upon the familiar principle that a purchaser at a sale made under the direction of the court and subject to the approval of the court, subjects himself to the jurisdiction of the court to compel completion of the purchase (III, p. 7), but reversed the lower courts in so far as they required the syndicate members to furnish the funds for completion of the sale.

Two Judges of the New York Court of Appeals were of the opinion that the summary jurisdiction of the court was properly invoked against the individual members of the syndicate on the ground that "the determination of the Special Term justice, who supervised this whole matter, that the individual defendants were the real contracting parties was amply justified by the evidence before him" (III, p. 10). However, the majority of the Court of Appeals voted to reverse the lower courts in so far as the individuals were concerned, on the ground that they were not being charged with contempt of Court or fraud upon the Court but rather with responsibility for the acts of the corporation, and that the syndicate members had in no manner become parties to the proceeding in which the court had jurisdiction under the statutes, saying, however, that perhaps in a formal action brought by the trustees

they may be able to show that the syndicate members had been guilty of fraud or that for other reasons the court should look behind the corporate entity and hold the syndicate members for the dereliction of the corporation (III, p. 8).

Thus any question with respect to due process under the Constitution was decided in favor of the syndicate members. The question with respect to compelling the corporation to complete the purchase involved no Constitutional question but merely a question of practice which has been the established practice from the earliest times.

ARGUMENT

I

Petitioner's contention that the trustees should have compelled performance of the contract of purchase by formal action for specific performance and not by available remedy in the reorganization proceeding, does not present any constitutional question.

Petitioner does not dispute the universal rule that a purchaser at a judicial sale, though not named as a party to the proceeding, submits himself to the jurisdiction of the Court in the proceeding in which the sale is made.

Cazet v. *Hubbell*, 36 N. Y. 677;
Hale v. *Clauson*, 60 N. Y. 339, 341.

Petitioner does not claim that any of the New York statutes set forth in the petition under "Statutes Involved" violate any provisions of the Constitution. It is merely claimed that the sale herein was not a judicial sale and that therefore the method of procedure should have been different from that which was followed.

The practically universal practice is to make application to the Court to compel the purchaser to complete his purchase as "a mere incident to the due exercise of the principal jurisdiction" (*Archer* v. *Archer,* 155 N. Y. 415). Such jurisdiction may be exercised "by petition or motion" in the original suit or proceeding. The purchaser acquires no rights "which may not be modified, controlled or directed, without any new proceeding directly against him" (*Archer* v. *Archer, supra*). Resort to an action for specific performance is not necessary (*Matter of Benedict,* 239 N. Y. 440, 446). The Court hears the application to compel completion on affidavits or may refer the matter to a referee, if necessary. "The rights of the parties can always be fully protected by the Court in directing when and upon what conditions further affidavits are to be read" (*Wanser* v. *De Nyse,* 188 N. Y. 378, 383).

Petitioner contends that the property was not *in custodia legis* and that therefore the sale was not a judicial sale.

There are many instances where the property is not in the actual custody of the court and yet a sale thereof is regarded as a judicial sale.

Trustees appointed by a will are, in some instances, required to petition the Court for leave ~~to~~ sell (N. Y. Real Property Law, secs. 105, 107). If the Court approves the transaction a final order is made empowering the trustee (and not a referee or special master), to carry out the transaction (id. sec. 107j).

A sale by an executor or administrator may be had for practically every purpose, including distribution of the estate (N. Y. Surrogate's Court Act, sec. 234). It must be authorized by the Court but no referee or special master is appointed to conduct the sale. The executor or administrator is directed to make the sale (id. sec. 238). Such sales are regarded as judicial sales (*Delaplaine* v. *Lawrence,* 3 N. Y. 301, 304; *Matter of Lynch,* 33 Hun 309).

Sales of real property of an infant or incompetent are not made at public auction. Application is made to the Court for leave to sell. The special guardian for the infant or the incompetent, or the committee for the incompetent enters into a contract of sale subject to the approval of the Court and then executes the deed to be given to the purchaser (New York Civil Practice Act, secs. 1393, 1394, 1396, 1397).

Completion of the purchase on such sales has been compelled by order in the proceeding, from earliest times, (*Brasher* v. *Cortland,* 2 Johns. Ch. 505), while, on the other hand, a purchaser upon such a sale may be relieved upon motion where good title cannot be conveyed (*Matter of Marino,* 215 App. Div. 841, 213 N. Y. Suppl. 680).

A receiver of the property of a corporation who has title "for the benefit of creditors and stockholders" (N. Y. General Corporation Law, sec. 168) may sell at public or private sale in such manner and on such terms as the Court may direct, and the receiver executes the conveyance (Gen. Corp. Law, sec. 169, subd. 2). A sale made through a contract by the receiver, although not at public auction, is a judicial sale (*People* v. *N. Y. Building-Loan Banking Co.,* 189 N. Y. 233).

A sale made by the New York Superintendent of Banks in liquidating a trust company is regarded as a judicial sale (*Matter of Supt. of Banks,* 207 N. Y. 11).

So also, while a general assignment for the benefit of creditors proceeds from the voluntary act of the assignor, the administration of the trust and the powers of the assignee are subject to the supervision and control of the court. By purchasing at a sale made by the assignee, the purchaser makes himself a party to the proceeding and subjects himself to the jurisdiction of the Court. The approval of the sale and the enforcement thereof, are mere incidents in the administration of the trust (*Matter of Sheldon,* 173 N. Y. 287).

It is not important, for the purposes of the question, whether the sale be public or private, only that it be made pursuant to the direction or authority of the Court. "It then has the character of a judicial sale" (*Matter of Dennison,* 114 N. Y. 621, 622).

It has been doubted, in the case of judicial sales, whether resort could be had to an action of specific performance. The remedy is to bring the defaulting purchaser before the Court by motion (*Przewozniczek* v. *Machowicz,* 123 Misc. 376, 205 N. Y. Suppl. 795).

II

Whether the sale is classified as a judicial sale or not, the Schackno Act and the Mortgage Commission Act conferred statutory jurisdiction upon the New York Supreme Court to pass upon every incident in a mortgage reorganization proceeding.

The sale was merely a step in the liquidation of the trust estate which the New York Supreme Court had within its jurisdiction until the complete liquidation of the trust estate and the termination of the trust (I, p. 91).

The Mortgage Commission, acting under the Schackno Act and the Mortgage Commission Act, instituted this proceeding for the approval of a plan promulgated for the reorganization of the rights of the certificate holders (I, p. 85, f. 255).

Section 1 of the Schackno Act shows the comprehensive purposes of reorganization proceedings. That section states that the mortgage corporations were not amenable to the Federal bankruptcy laws and that the holders of mortgage investments (participation certificates, sec. 2 of the Act), could not avail themselves of the composition provisions of such bankruptcy laws for the settlement of their claims against the mortgage companies in respect of

guaranties undertaken by them and that therefore it is "essential for the public interest to provide a procedure under which" the mortgages and other security "may be liquidated."

Section 10 of the Mortgage Commission Act expressly provides for the appointment of trustees to take over the mortgage security. By section 11, the New York Supreme Court is given jurisdiction to approve, modify or disapprove the plan. The Presiding Justice of each Appellate Division of the New York Supreme Court was authorized to fix the time and place for holding special terms for the hearing "and determination of reorganization proceedings" and any Justice so assigned was vested with very broad powers "in the supervision of such trusts" (sec. 17a, Mortgage Commission Act).

The plan having been promulgated under both Acts, it obviously involved the "readjustment or liquidation" of the mortgage security as provided in section 18 of the Mortgage Commission Act.

The purpose of those two Acts was to provide for the reorganization of certificated mortgage issues so that trustees could administer the underlying mortgages for the benefit of the certificate holders as a class (*Mittlemann* v. *President & Directors of Manhattan Co.*, 248 App. Div. 79, 289 N. Y. Suppl. 2, aff'd. no op. 272 N. Y. 632; *Weil* v. *same*, 275 N. Y. 238).

The principle is thoroughly established and accepted that "by virtue of the order (of rehabilitation) and Article 11 of the (New York) Insurance Law the Superintendent (of Insurance) became in effect a receiver under the supervision of the State court, and the property under his control became *in custodia legis*" (*Jacoby* v. *Bond and Mortgage Guarantee Co.*, 72 Fed. 2d 420, cert. den. 293 U. S. 619; *Tolfree* v. *N. Y. Title and Mortgage Co.*, 72 Fed. 2d 702, cert. den. 293 U. S. 619).

Here the trustees were not acting as trustees of a private trust as if they were merely acting as trustees under a mortgage indenture, or as a successor of such trustee appointed by the court as in the case cited by petitioner (*Commonwealth Co.* v. *Bradford,* 297 U. S. 613). The trustees were not appointed as successors to Title Guarantee and Trust Company, which was named as mortgagee in the mortgage. The trustees were appointed by the Court in the reorganization proceeding to succeed the Superindendent of Insurance in managing and ultimately liquidating a trust estate created under the emergency statutes (*Schackno Act and Mortgage Commission Act, supra*). Such a trust or receivership is not a private trust. A receivership continues until its object is achieved and does not terminate by change in personnel during its administration (*McNulta* v. *Lochridge,* 141 U. S. 327, 332).

A trust under the Schackno Act "is one public in its nature, undertaken primarily for the protection of mortgage certificate holders, where the court, under the statute (Schackno Act) passed in the emergency caused by the financial depression, is undertaking to direct the administration of the trust through its agents, first the Superintendent of Insurance and later the trustees under the plan. Fundamentally it is still a statutory receivership with change in method for the reason that the office of the Superintendent of Insurance was not equipped to handle the affairs of so many corporations of the same type that had come into his hands. Therefore, in this case, another agency of administration was selected; but this agency, like the Superintendent of Insurance, was at all times under the direction of the court * * *."

> *Hurdman* v. *Kelly,* 254 App. Div. 368, 5 N. Y. Suppl. 2d 378.

When a plan of reorganization is approved, that does not end the functions or jurisdiction of the Court. "There-

upon'' such steps are to be taken by the Superintendent of Insurance and all other parties and all acts are to be done which may be required by the plan or which may be necessary or desirable for the consummation of the plan (subd. 3, sec. 6, Schackno Act) and provision is made for the payment of the expenses of the plan ''from the commencement of the proceeding until the final consummation thereof'' (subd. 4, same section).

The intention plainly was to conform the State procedure, as much as possible, to that in Federal reorganizations, where the custom is that the Judge who entertains the original petition for reorganization usually retains the case until completion so that it may not be necessary to acquaint each Judge at a succeeding term with the proceedings already had.

The plain intent of the New York statutes would be frustrated if it were held that each time some order or direction became necessary in the reorganization proceeding, a separate and independent formal action had to be instituted. There were thousands of such proceedings. If separate independent actions were necessary to enforce accomplishment of ultimate liquidation, this, and perhaps the next, generation will not see the end.

III

The Constitution does not undertake to control State Court methods of procedure.

''The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard'' (*Hooker* v. *Los Angeles*, 188 U. S. 314, 318).

There is no need to discuss the authorities cited by petitioner, such as *Morgan* v. *U. S.* (298 U. S. 468) where

the grievance was that plaintiff had not been given the hearing which a statute required. It was not a question of a "particular type of procedure" (p. 478).

The order to show cause and the affidavits upon which the application was made in this reorganization proceeding to compel completion of the purchase, served the same purpose as a summons and complaint (*Matter of Young,* 66 Misc. 216, 122 N. Y. Suppl. 1116).

Under the New York practice, the provisions of law relating to the mode of personal service of a summons apply to the service of any process whereby a special proceeding is commenced except contempt proceedings, which this is not, or unless special modes of service are prescribed by law (Rule 21, N. Y. Rules of Civ. Pr.). None such is claimed.

The respondents were thereupon deemed to be plaintiffs and the petitioner was deemed to be a defendant (N. Y. Civil Practice Act, sec. 191).

This Court does not undertake to determine whether the procedure in a State court was in accordance with the State law. The final judgment of the State court determines that it was (*United Gas Co.* v. *Texas,* 303 U. S. 123).

Petitioner does not claim that it was deprived of any right of trial by jury. The claim is that petitioner should have been brought into Court by a piece of paper,—a summons in an independent equity action for specific performance where no right to a jury trial existed, rather than by another piece of paper,—an order to show cause issued by the Court in the pending reorganization proceeding.

Petitioner does not claim that adequate notice had not been given to it of the proceeding to compel completion of the purchase.

Petitioner was personally served (I, p. 70, f. 209) with the affidavits and other documents and with the order

directing it to show cause why it should not be required to complete its purchase. That constituted due process.

> "* * * It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words * * *."

Iowa Central R. Co. v. *Iowa,* 160 U. S. 389; *Cincinnati St. Ry.* v. *Snell,* 193 U. S. 30.

Not only was the petitioner afforded an opportunity to be heard, but it was actually heard on the merits. Petitioner asserted in the State courts (I, p. 104), and still urges in this Court, that the trustees did not own the property affected by the sale, that it was owned by the County of Nassau and that the trustees could not convey title.

Tax liens affecting all of the property had been sold prior to the appointment of the trustees (I, p. 10, f. 30). When the purchaser of the tax liens—the County of Nassau—threatened to take title to the property by virtue of the tax liens, the trustees brought suit to enjoin the county from so doing. While that suit was pending, the county

nevertheless took deeds (I, p. 11). This the county had no legal right to do (*Bonded Municipal Corp.* v. *Carodix Corp.*, N. Y. Law Journal, August 1, 1942, p. 257; *Matter of Munson*, 11 Fed. Supp. 564). Additional authorities on this feature need not be cited, because the County of Nassau entered into a written stipulation with the trustees to reconvey the property to the trustees and the trustees agreed to discontinue the action which they had brought to enjoin the delivery of the so-called tax deeds (I, p. 61). All this was presented in the State court and approved (I, p. 98, f. 293). The order of the State Supreme Court directing petitioner to complete the purchase (I, p. 5) necessarily involved a finding that the trustees had title. That order was affirmed by the Appellate Division of the New York Supreme Court (I, p. 135) and by the New York Court of Appeals (III, p. 12). Such determination upon the facts is not reviewable here.

Petitioner further contended, on the merits, that it had made a tender of the balance of the purchase price and that the trustees failed to deliver the required conveyance of the property to it.

The facts in this respect were also presented by the petitioner to the State courts (I, p. 104). Two days before the time set for the completion of the purchase, petitioner's then attorney reported that the syndicate members lacked part of the necessary cash to complete the purchase. Additional time was requested (I, p. 25, f. 75). When all parties met at the time agreed for the purpose, petitioner was not ready to fulfill the contract (I, p. 26, ff. 77, 78). All of the trustees were present and the deed was ready for execution as were also the mortgages which the petitioner was to execute. After all of the trustees had left, and late in the day, the syndicate members returned and offered checks totalling $75,000. They were not the checks of the petitioner corporation but of one of the individuals composing the syndicate. The parties would not commit

themselves as to whether they were really making a tender or were offering the checks merely so that it could not be said they were in default (I, p. 27, ff. 79, 80, p. 75, f. 224). The trustees not being present (I, p. 74) naturally their deed could not be delivered. The amount of the mortgage which was to be delivered by the petitioner was not even computed (I, p. 75, f. 223). In any event, further time to complete the purchase was given to the petitioner and subsequent negotiations were conducted by them apparently for the purpose of raising the additional funds which one of the syndicate members (I, p. 76, f. 228) had failed to supply (I, pp. 28, 76). Subsequently, the attorney for the purchaser announced that the additional cash had not been raised, that the transaction could not be consummated and that no formal tender of the trustees' deed was necessary (I, p. 76, f. 227). The thin pretence was presented to the courts below that when the attorney for petitioner attended at the adjourned time for closing title and when he participated in the subsequent transactions looking toward completion of the purchase, he was no longer acting for petitioner but really as a kindness to the attorney for the trustees (I, p. 117, f. 351). When the State Supreme Court directed completion of the purchase, there was necessarily implied a finding that the court did not regard that petitioner had made any legal tender. Indeed, petitioner could have taken title at any time had it desired to do so. It did not even take title when the court directed it to do so. The New York Court of Appeals specifically found that petitioner was at fault in not completing the purchase (III, p. 6, f. 17). This determination upon the facts is likewise not reviewable here.

After the State Supreme Court had directed petitioner to complete the purchase, petitioner applied to that court for a re-hearing. On that application it attacked the validity of the reorganization proceeding, claiming that the plan of reorganization had not been consented to by the number of certificate holders required by the statute. The

application was denied by order entered October 18, 1940, and petitioner appealed to the Appellate Division of the New York Supreme Court (I, p. 136, f. 137) where the ruling of the lower court was unanimously sustained (*Matter of Bond & Mortgage Guar. Co.*, 262 App. Div. 857, no op.). The order of the Appellate Division (I, p. 136), recites this application for rehearing and affirms the denial thereof. None of the papers on such application for rehearing have been printed in the record presented to this Court, presumably on the theory that petitioner had not asked for any review of that ruling by the New York Court of Appeals. It would seem to us that the papers on the application for rehearing should have been included in the record in this Court.

Petitioner not only had due notice of the original application to compel completion of the purchase and therein presented its contentions on the merits by asserting that the trustees did not have any title and that petitioner had made a tender and was not in default, but itself invoked the jurisdiction of the State Supreme Court when petitioner applied for a rehearing. Petitioner should not now be heard to say that all this was merely a joke. (*McDonald* v. *Oregon R. & N. Co.*, 233 U. S. 665).

CONCLUSION

Petitioner has not shown any ground recognized by this court as the basis for a writ of certiorari and its petition should be denied.

December, 1942.

Respectfully submitted,

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Frederick A. Keck,
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 535.

PARAGON LAND CORP.,

Petitioner,

v.

JOSEPH P. DAY and BRADLEY DELEHANTY,
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Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Respondents in their brief make certain statements of fact which are not supported by the record and by reason thereof it is necessary to briefly refer to same.

The offer made by Levingson on behalf of a syndicate referred to in respondents' brief (p. 4) did not provide for the payment of $90,000 in cash as therein claimed and in addition this original offer has no significance as appears from the affidavit of the deceased trustee Crane wherein it is said (R. 12, Vol. I):

> "It is not necessary to state the terms of this proposal at this time, because it merely initiated negotiations which were thereafter carried on."

At page 4 of respondent's brief they omit to state that the Judge presiding at a Special Term of the Supreme Court stated that "if the terms, conditions and form of the contract are satisfactory to the Court, an order would be entered approving the same" (R. 13, Vol. I).

The subsequent written contract between the trustees as sellers and the petitioner as purchaser was completely different from the so-called Levingson offer which initiated the negotiations and this is conceded in the record, although the respondents' brief tries to create a contrary impression.

The respondents in their brief would have this Court believe that they own the real estate which is referred to herein, whereas the respondents know that the County of Nassau heretofore obtained a judgment against the respondents wherein it was adjudicated that the said County of Nassau became the owner of the property by reason of the tax deeds received by it.

ARGUMENT.

1(a) The Constitution Is Protection Against An Unlawful Method Of Procedure In State Courts Which Deprives A Person Of His Property Without Due Process Of Law. The Petitioner Never Sought An Adjudication On The Merits.

The respondents under Point III contend that the Constitution does not undertake to control State Court methods of procedure and that the petitioner sought an adjudication on the merits. Both statements are incorrect.

When the method of procedure in a State Court is contrary to the law of that State, the Constitution of the United States is protection against the deprivation of a person's property rights without due process of law. The cases cited by the respondents involved specific statutory procedure (*Iowa Central R. Co.* v. *Iowa,* 160 U. S. 389; *Cincinnati St. Ry.* v. *Snell,* 193 U. S. 30).

The petitioner from the very inception objected to the jurisdiction of the New York State Supreme Court and throughout the proceedings insisted upon its constitutional rights and merely stated the facts in its affidavit to buttress its claim that there was no jurisdiction.

1(b) The Statutory Proceeding For The Reorganization Of A Certificated Mortgage Under The Schackno Act And Mortgage Commission Act Terminated Upon The Entry Of The Final Order Approving The Plan And Appointing The Trustees.

The subsequent sale of real property by the trustees which they did not own, was not an incident in the original reorganization proceeding and the New York Supreme Court did not have statutory jurisdiction with respect to same.

The trustees had applied to the Supreme Court for instructions with respect to the trust estate, but such an application is separate and apart from the original statutory proceedings wherein they had been appointed.

The respondents contend that the provisions of the final order in the reorganization proceeding wherein it is said that the "Court, having assumed jurisdiction of this proceeding, shall retain jurisdiction thereof until the complete liquidation of the trust estate, and the termination of the trust" (R. 91, Vol. I) is the basis for the Court's jurisdiction. This argument is contrary to law.

Special Term of the Supreme Court of the State of New York for reorganizations under the said Acts is a statutory Court whose powers is limited by the said statutes.

People (*Title & Mtge. Guarantee Co.*), 265 N. Y. 69;
Matter of Lawyers Mortgage Co., 277 N. Y. 244;
Culver Contracting Company v. *Humphrey*, 268 N. Y. 26, 33, 34;
Finlay v. *Finlay*, 240 N. Y. 429, 432;
Matter of New York Title & Mtge. Co., 257 App. Div. 19 (appeal dismissed 281 N. Y. 829);
Mittleman v. *President, etc.*, 248 App. Div. 79 (aff. no op. 272 N. Y. 632).

The purpose of the two Acts was solely to make it possible for great numbers of certificate holders to act as a unit in the management of mortgages deposited as security to certificates without the consent of all and to furnish the machinery for bringing about and carrying on such united action. The trustees appointed pursuant to said Acts are statutory trustees and not officers of the Court.

> *Weil* v. *President, etc., of Manhattan Co.*, 275 N. Y. 238, 242, 243.

When Special Term of the Supreme Court made the final order approving the plan and appointing the trustees, the essential purpose and reason for the emergency statutes had been satisfied.

There is no provision in either the Schackno Act or the Mortgage Commission Act for the retention of jurisdiction by Special Term of the Supreme Court of a proceeding for the reorganization of a mortgage issue after the entry of the final order approving the plan and until the liquidation of the trust estate and the termination of the trust. This is conclusively evidenced by the subsequent amendment of the Mortgage Commission Act and the incorporation therein of Section 14a which directs the trustees to file annual accounts *with the Court who appointed them, and not in the proceeding wherein they were appointed.* If the respondents' contentions were correct and the proceedings were deemed to continue there would have been no necessity for said Section 14a, and the special proceedings in the Supreme Court therein provided for with respect to said accounting. In the absence of statutory provision, the trustees appointed in a reorganization proceeding could only account in an action commenced for that purpose.

The respondents' argument (pp. 7-10) that there was an available remedy in the reorganization proceeding wherein they could obtain a summary adjudication of a controversy between the petitioner and the respondents with respect to a contract of sale, receives no support whatsoever from

the cases cited by them wherein the res was in the possession and control of the Court making the decree or order, either through receivership, foreclosure, partition, incompetency, infancy, bankruptcy or other appropriate proceeding, where the sale was made by the Court through its duly appointed officer, the Court having jurisdiction over the property it was selling and retaining jurisdiction in a summary way to pass upon the sale and to enforce its decree against the purchaser if necessary.

CONCLUSION.

It is respectfully submitted that this petition should be granted.

Respectfully submitted,

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